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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
A & M BY-PRODUCTS, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No.. 85-96

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a civil penalty (DE 85-239) in the sum of \$5,000 for violation of a state waste discharge permit came on for formal hearing before the Pollution Control Hearings Board; Wick Dufford (presiding), Lawrence J. Faulk and Gayle Rothrock, at Seattle, Washington, on October 3, 1985. Delores A. Rawlins reported the proceedings.

Appellant company was represented by Brian L. Hansen, attorney at law. Respondent Department of Ecology (DOE) was represented by Leslie Nellermoe, Assistant Attorney General.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Argument was heard. From the testimony, evidence, and
3 contentions of the parties, the Board makes these

4 FINDINGS OF FACT

5 I

6 Respondent DOE is a state agency with responsibility for
7 implementing the water pollution control laws, including the issuance
8 and enforcement of waste disposal permits.

9 II

10 Appellant company operates a plant which processes fish carcasses,
11 rendering them in retorts into fish meal and fish oil.

12 The plant is located at a rural site in Whatcom County east of
13 Bellingham near a watercourse named Andersen Creek, a tributary of the
14 Nooksak river. The creek is used for stockwatering and irrigation.
15 Water from the Nooksak below the inflow of Andersen Creek is used for
16 municipal water supply.

17 III

18 The rendering process produces waste water principally from two
19 sources: wash down water from the plant itself and scrubber
20 condensate from odor control facilities. Smaller percentages are
21 contributed by moisture from the raw material and by storm runoff
22 water which gets into the system. Waste water from the process
23 sources is collected in a gravity grease separator. All of it is
24 ultimately conducted to holding tanks from which (normally) it is
25 pumped and hauled away.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-96

IV

The company was issued State Waste Discharge Permit No. 3232 on December 7, 1983, and this permit was in effect in February of 1985. The permit does not allow the discharge of process waste water to Andersen Creek. Rather, it calls for the discharge of such waters to the Bellingham waste water treatment plant.

V

On February 13, 1985, DOE's inspector visited the plant on a routine inspection. While there he and the plant manager jointly discovered an overflow of waste water exiting a holding tank and flowing across the approximately 50 feet separating the tanks from Andersen Creek, entering the creek at about three gallons per minute.

The inspector took a sample of this waste water at a point just prior to its entry into the creek. He refrigerated the sample and transported it to the DOE's laboratory for analysis.

The analysis revealed levels of biochemical oxygen demand (BOD) of five to six times the levels normal for waste water.

VI

The overflow resulted simply from allowing the holding tanks then connected to the system to get too full.

Normal operations at that time involved daily checks of the storage tanks. When they were nearing capacity a hauler (Western Services) was called and a truck was sent out to pump the tanks and carry the waste water to the treatment plant. This occurred about once a week. A haul from A & M was made on February 7, 1985.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-96

VII

On the day preceding the overflow, officials of A & M had contacted the hauler and asked them to send a truck out to pick up waste water because the tanks were nearing capacity. The hauler was unable to comply due to short term road restrictions then in effect on heavy vehicles using public roads. The restrictions were in place because the frost was coming out of the ground and the subsurface under the roads was very soft.

VIII

On the morning of the 13th, the tanks were inspected. A & M's manager judged that there was enough capacity to last into the following day. Wash down and condensate discharges were ceased. However, further inflow from storm water sources was uncontrollable with the system then in place.

At that time additional storage was available in an unused tank and a tank trailer at the plant. However, these containers were not connected to the system and pumping was required to transfer waste water to them. The company did not possess pumping equipment adequate for this job.

IX

After the overflow was discovered, A & M's manager called the hauler again and asked him to request an exemption from the road restrictions from the County. The hauler did so and was authorized to proceed to the A & M plant. That evening a truck was sent in and waste water was pumped, with the hauler's equipment, into the other

1 holding tanks on site.

2 X

3 By February 19, 1985, the road restrictions had been lifted and
4 the hauler arrived and emptied out all of the tanks containing waste
5 water at the plant. Since that time no further overflow problems have
6 been experienced. The company has bought a gas pump and tied all of
7 its holding tanks together. Plant improvements have also improved
8 control of waste water system inflow.

9 XI

10 A & M had earlier experience with less stringent road restrictions
11 in December, 1984, but were unprepared for the situation in February
12 which (until the exemption was granted) barred even an empty tank
13 truck from coming to the plant. No reason appears why the company
14 could not have been better informed about such possibilities.

15 XII

16 On March 27, 1985, DOE issued Notice of Penalty Incurred and Due
17 No. DE 85-239 to A & M By-Products. The notice imposed a penalty of
18 \$5,000 for violation of State Waste Discharge Permit No. 3232 on
19 February 13, 1985, because of the discharge of waste water to Andersen
20 Creek.

21 On April 12, 1985, appellant made Application for Relief from
22 Penalty to DOE. The application asserted that the violation was
23 unavoidable and should be excused due to the problem of severe road
24 restrictions, and because of efforts, after-the-fact, to control the
25 overflow. The agency denied this request and affirmed its penalty on

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-96

1 May 6, 1985.

2 From this an appeal was lodged with this Board on May 29, 1985.

3 XIII

4 Certain documents concerning prior water pollution control
5 dealings between A & M By-Products and DOE were admitted. These
6 evidenced the agreement of the parties as to resolving disputes and
7 did not involve any judgment that the company had in the past violated
8 the statutes.

9 On April 12, 1985, the parties entered a Stipulation agreeing,
10 among other things, that:

11 Facility improvements will be made by July 15, 1985,
12 the work will include improvement of the receiving
13 bay to contain waste water. All waste water will be
14 contained and diverted into the facility's holding
15 tanks and disposed of pursuant to the terms and
16 conditions of the facility's waste discharge permit.
Additionally, A & M By-Products agrees to contain
waste water discharge it presently channels into an
open ditch by diverting it into the facility's
holding tanks.

17 The company has complied with this agreement.

18 XIV

19 The DOE adopted comprehensive guidelines and procedures for
20 enforcement in June of 1985.

21 XV

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby
23 adopted as such.

24 From these Findings of Fact the Board comes to these

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-96

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.
4 Chapters 43.21B and 90.48 RCW

5 II

6 Under RCW 90.48.160, waste discharge permits are required of all
7 commercial or industrial operations which discharge wastes to waters
8 of the state. Such permits are issued pursuant to RCW 90.48.180.

9 III

10 RCW 90.48.144 authorizes the imposition of civil penalties on a
11 strict liability basis. It states in pertinent part:

12 Every person who: (1) violates the terms or
13 conditions of a waste discharge permit issued
14 pursuant to RCW 90.48.180...shall incur, in addition
15 to any other penalty as provided by law, a penalty in
16 an amount of up to five thousand dollars a day for
17 every such violation. Each and every such violation
shall be a separate and distinct offense, and in case
of a continuing violation, every day's continuance
shall be and be deemed to be a separate and distinct
violation....

18 IV

19 We conclude that on February 13, 1985, appellant A & M
20 By-Products, Inc., violated the provisions of State Waste Discharge
21 Permit No. 3232, by discharging waste water to Andersen Creek. The
22 explanations offered by appellant cannot operate to excuse the
23 violation itself.

24 V

25 However, such explanations are relevant to a consideration of the

1 amount of the penalty imposed. The surrounding facts and
2 circumstances bear on the reasonableness of the fine, in light of
3 factors such as

- 4 (a) the nature of the violation;
- 5 (b) the prior behavior of the violator; and
- 6 (c) actions taken to solve the problem.

7 City of Centralia v. Department of Ecology, PCHB No. 84-287.

8 VI

9 In this case, the violation is clear. But, it was not shown to
10 have, in fact, produced any harm.

11 Notwithstanding a history of dispute between the company and the
12 enforcement agency, it appears that considerable effort has been made
13 since the violation to prevent a recurrence. No subsequent overflow
14 incident has been reported. At the time of the violation, the company
15 took action to curtail waste flows and after discovering the overflow
16 problem moved quickly to put a stop to it.

17 Nonetheless the conditions which arose from the road restrictions,
18 the inadequate storage capacity and the lack of pumping equipment
19 could have been anticipated by A & M and, reasonably, should have been.

20 In light of the entire record, we conclude that the Order entered
21 below is appropriate.

22 VII

23 The June 1985 enforcement guidelines were adopted by the DOE after
24 the events at issue and are, therefore, irrelevant here.

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-96

VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The Notice of Penalty Incurred and Due DE 85-239 issued by the DOE to A & M By-Products, Inc., is affirmed in the amount of \$2,500; \$2,500 of the penalty is vacated.

DONE this 17th day of December, 1985.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Lawyer Member

Lawrence J. Faulk

LAWRENCE J. FAULK, Chairman

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman